

NO. 43745-7-II
COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,
Respondent, Cross-Appellant,
vs.
CHAD CHRISTENSEN,
Appellant, Cross-Respondent.

BRIEF OF CROSS-RESPONDENT

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STATEMENT OF THE CASE

By amended information filed March 2, 2012, the Lewis County Prosecutor charged the defendant Chad Ernest Christensen with one count of first degree child molestation. CP 34. The information alleged as follows:

On or about or between September 12, 2009 and October 12, 2011, in the County of Lewis, State of Washington, the above-named defendant, being at least thirty-six (36) months older than I.B., (DOB: 09/12/2002), who was less than twelve (12) years old and not married to the defendant and not in a state registered domestic partnership with the defendant, did have sexual contact with I.B., (DOB: 09/12/2002), or did knowingly cause another, who was under the age of eighteen (18) years, to have sexual contact with I.B., (DOB: 09/12/2002); contrary to the Revised Code of Washington 9A.44.083.

CP 34.

The case was later tried to a jury with the court giving the following “to convict” instruction:

Instruction No. 6

To convict the defendant of the crime of Child Molestation in the First Degree each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between September 12, 2009 and October 12, 2011, the defendant had sexual contact with [I B.];
- (2) That [I.B.] was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That [I.B.] was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 109.

The state had proposed this instruction including the time period mentioned in the first listed element. CP 77. The state also proposed a general verdict form for this alleged offense, which the court used. CP 83, 115. While the state did propose a special verdict form relating to its alleged aggravating circumstance, the state did not propose and the court did not give a special verdict form asking the jury to identify the date upon which the offense occurred. CP 68-84, 101-114.

The jury returned a general verdict of “guilty.” CP 115. Both parties later stipulated that the defendant’s criminal history included a conviction for second degree unlawful possession of a firearm with the following relevant dates: (1) committed on 11/26/2005, (2) sentenced on 3/29/2005, (3) released from jail after completing sentence on July 20, 2006. RP 146.

At sentencing the issue arose whether or not this offense “washed” for the purposes of calculating the defendant’s offender score, given the fact that five years from the defendant’s release occurred on 7/20/11, which was within the charging period of 9/12/09 and 10/12/11. CP132-135; RP 504-

520. The state argued that the court should find that the only credible evidence presented at trial supported the conclusion that the defendant committed the new offense prior to 7/20/11, even though the information and the “to convict” instruction included a time period past that date to 10/12/11. *Id.* Thus, the state argued that the defendant’s offender score was seven points yielding a suggested range of 108-144 months. CP132-135. The defense argued that since the jury returned a general verdict of “guilty” on a charging period that included time after the washout period the court had to employ the rule of lenity and count the offense as washed. RP 506-508. Thus, the defense argued that the correct offender score was 6 points yielding a suggested range of 98-132 months. *Id.* The court responded to these arguments by holding as follows:

The Court finds that the Unlawful Possession of a Firearm crime washes.

RP 514.

The court thereafter imposed a sentence of life in prison with a minimum mandatory time to serve of 132 months before the defendant could first be considered for release. CP 167. The court arrived at the minimum term by sentencing the defendant to 114 months and then adding 18 months as an exceptional sentence based upon the jury’s finding of an aggravating fact. RP 514-520.

ARGUMENT

I. THE STATE SHOULD BE EQUITABLY ESTOPPED FROM ARGUING THAT THE DEFENDANT'S PRIOR CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM DID NOT WASH.

Under the principle of equitable estoppel, the court will preclude a party from making an otherwise available legal argument, if the opposing party can prove the following elements by clear, cogent, and convincing evidence of: (1) an admission, statement, or act inconsistent with a claim afterwards asserted; (2) action by another in reasonable reliance on the act or statement; and (3) injury to the relying party if the other party is allowed to contradict the prior act, statement, or admission. *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992). However, equitable estoppel is not favored and will not be applied against governmental entities unless necessary to prevent a manifest injustice and that the exercise of government functions will not be impaired as a result of the estoppel. *Shafer v. State*, 83 Wn.2d 618, 521 P.2d 736 (1974). Although normally the creature of civil law, it can also be applied against the state in a criminal case if the defense meets its burden of proof. *In re Peterson*, 99 Wn.App. 673, 995 P.2d 83 (2000).

In the case at bar the facts demonstrate an appropriate scenario in which to employ the doctrine of equitable estoppel. First, in this case the state did commit an act inconsistent with a claim afterwards asserted. Actually, the state committed three such acts. The first was when the state

alleged a time period for the commission of the offense that extended over the wash out period for the defendant's prior offense. The second was when the state proposed a jury instruction that incorporated this time period. The third was when the state failed to propose a special verdict asking the jury to determine the actual date of the offense.

Second, under the doctrine of equitable estoppel, the defense relied upon the state's allegation by failing to even address the issue of when the alleged offense occurred. Rather, the defense simply took the stand that no offense occurred at all. Third, in this case the defense will be injured if the state is allowed to now claim that the offense occurred within the time frame that would prevent the prior conviction from washing because the defendant would be subject to a new sentencing hearing in which he could receive an even longer minimum sentence based upon a higher range. Thus, under the facts of this case, this court should employ the doctrine of equitable estoppel to prevent the state from arguing that the trial court should have found that the offense occurred at a specific time within the range that the state had set in the information and the "to convict" instruction. Indeed, one is left to question exactly how the state could be so uncertain of the time period in which it claimed that the defendant committed a single offense such that it alleged an operative time period of 25 months in the Information and the "to convict" instruction and then claimed at sentencing that the offense was

committed with a range of only a couple of months.

II. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THE DEFENDANT’S PRIOR CONVICTION FOR SECOND DEGREE UNLAWFUL POSSESSION OF A FIREARM HAD WASHED.

The calculation of wash out periods for most Class C felonies is governed by RCW 9.94A.525(2)(c). This subsection states:

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(c)(c).

Under RCW 9.94A.530(2), the sentencing court may only consider information that has been admitted, acknowledged or proven at trial or a sentencing hearing when calculating a defendant’s offender score or criminal history. In the case at bar, the defendant did not admit or acknowledge that the offense was committed during the time period alleged by the state at the sentencing hearing and the jury did not so find. Rather, the jury found by general verdict that the defendant committed the offense within the time the state alleged in the information and incorporated into the “to convict” instruction.

The Washington Supreme Court’s decision in *State v. Parker*, 132

Wn.2d 182, 937 P.2d 575 (1997) is instructive on the issue before this court. In that case the state alleged that the defendant had committed an offense over a window of time just as the state did in this case. However, the legislature had increased the penalty for that offense effective on a date in the midst of the time during which the state alleged the defendant committed the offense. Although the jury returned a general verdict finding that the defendant had committed the offense in the time period alleged, the state argued at sentencing that the defendant had actually committed the offense after the effective date for the enhanced punishment. The court rejected this argument, finding that the defendant was entitled to be sentenced under the most lenient version of the statute.

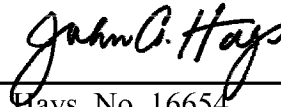
In this case the state argues that this court should ignore the decision in *Parker* because the evidence in this case “clearly shows” the time period during which the offense was committed. However, this is not the case. In fact, the time period was never challenged by the defense because it was not at issue. The defense presented was that no offense had been committed at all during the time period alleged. In addition, it was well within the jury’s right to find that the complaining witness was simply incorrect on the timing of the offense but was correct that the offense had occurred. Thus, in this case the trial court did not err when it found that the offense washed.

CONCLUSION

The court did not err when it found that the defendant's prior conviction for unlawful possession of a firearm washed.

DATED this 7th day of June, 2013.

Respectfully submitted,

A handwritten signature in black ink, reading "John A. Hays", is positioned above a horizontal line.

John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

RCW 9.94A.525(2)(c) Offender Score

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

. . .

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.530
Standard Sentence Range

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h).

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